(14,748.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

No. 232.

JOSEPH S. KENNEDY AND WILLIAM R. MOON, PLAINTIFFS IN ERROR,

vs.

DANIEL MAGONE, COLLECTOR OF THE PORT OF NEW YORK.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

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1 UNITED STATES OF AMERICA, *ss:*

Seal of U. S. Circuit Court, South. Dist. New York.

The President of the United States to the judges of the circuit court of the United States for the southern district of New York, Greeting:

Because in the records and proceedings and also in the rendition of the judgment of a plea which is in the said circuit court, before you, between Joseph S. Kennedy and William R. Moon, plaintiffs, and Daniel Magone, defendant, a manifest error hath happened, to the great damage of the said Joseph S. Kennedy and William R. Moon, plaintiffs in error, as by the complaint appears, we, being willing that the error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the twentieth day of July, eighteen hundred and ninety-one, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done thereon to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 25 day of June, in the year of our Lord one thousand eight hundred and ninety-one.

JOHN A. SHIELDS, *Clerk.*

The foregoing writ is hereby allowed.

E. HENRY LACOMBE.

2 [Endorsed:] E. & A. B., 1011. 13663. U. S. Supreme Court. Joseph S. Kennedy and William R. Moon, plaintiffs in error, against Daniel Magone, defendant in error. Writ of error. A. P. Ketchum, attorney for plaintiffs in error. Due service of a copy of the within writ of error is hereby admitted this 25 day of June, 1891. Edward Mitchell, U. S. att'y & attorney for defendant in error. P. 1.45 p'd. U. S. circuit court. Filed June 25, 1891. John A. Shields, clerk.

UNITED STATES OF AMERICA, *Southern District of New York,* } *ss:*

I, John A. Shields, clerk of the circuit court of the United States of America for the southern district of New York, in the second circuit, by virtue of the foregoing writ of error and in obedience thereto, do hereby certify that the following pages, numbered from three to sixty, inclusive, contain a true and complete transcript of

the records and proceedings had in said court in the case of Joseph S. Kennedy and William R. Moon, plaintiffs in error, against Daniel Magone, defendant in error, No. 13663, as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this sixteenth day of July, in the year of our Lord one thousand eight hundred and ninety-one, and of the Independence of the United States the one hundred and sixteenth.

Seal of U. S. Circuit Court, South. Dist. New York.

JOHN A. SHIELDS, *Clerk.*

3 Supreme Court of the State of New York, City and County of New York.

JOSEPH S. KENNEDY and WILLIAM R. MOON, Plaintiffs,
against
DANIEL MAGONE, Collector of the Port at New York, Defendant.
} Summons with Notice.

To the above-named defendant:

You are hereby summoned to answer the complaint in this action and to serve a copy of your answer on the plaintiffs' attorney within twenty days after the service of this summons, exclusive of the day of service, and in case of your failure to appear or answer judgment will be taken against you by default for the relief demanded in the complaint.

Dated February 21st, 1889.

A. P. KETCHUM,
Plaintiffs' Attorney,
Office, No. 4 William Street, New York City.

Notice.

Take notice that upon your default to appear or answer the above summons judgment will be taken against you for the sum of seventy cents, with interest from the 17th day of October, 1888, and with costs of this action.

A. P. KETCHUM,
Plaintiffs' Attorney.

4 Endorsed: N. S. 13663. N. Y. supreme court. Joseph S. Kennedy & ano., plaintiffs, against Daniel Magone, collector, &c., defendant. Summons with notice. A. P. Ketchum, plaintiffs' attorney, No. 4 William street, New York city. Personally served Feb. 21, 1889. Custom-house, New York. Received, U. S. attorney's office, Feb. 25, 1889.

5 N. Y. Supreme Court; City and County of New York.

JOSEPH S. KENNEDY and WILLIAM R. MOON
against
DANIEL MAGONE, Collector of the Port of New York. } No. 13663.

The above-named plaintiffs, for complaint in this action, state:

I. That the defendant, during the times hereinafter mentioned, was collector of the customs of the United States at the port of New York, and that the plaintiffs, during said times, were copartners in trade, doing business in New York and elsewhere under the firm name of Kennedy & Moon, and in said business imported and entered at the port of New York certain merchandise at the time and by the vessel specified in the plaintiffs' bill of particulars, which is hereby made part of this complaint.

II. That the defendant, as such collector, exacted from plaintiffs as and for fees, duties, and charges on said merchandise the sum specified in said bill of particulars, to wit, the sum of seventy cents ($0.70) in excess of the amount required by law, and which said excessive sum the plaintiffs, on or about the date specified in the said bill of particulars, and in order to obtain possession of said goods, were compelled to pay and did pay to the defendant.

6 III. That plaintiffs filed with the said defendant due and timely protest in writing, upon the entry of said goods, against the decision exacting said fees, duties, and charges, setting forth distinctly and specifically the grounds of objection thereto, and also as above stated.

IV. That plaintiffs have made due and timely appeal in said case to the Secretary of the Treasury, whose decision on said appeal has either been rendered within ninety days previous to the beginning of this suit or has been delayed more than ninety days from the date of such appeal on said entry.

V. That the said bill of particulars states for said importation the date of entry at the custom-house, the precise amount of duty, fees and charges claimed to have been exacted in excess, the date of payment of the same, of the filing of said protest, and of the appeal to the Secretary of the Treasury, and his decision thereon, if any, together with the other particulars required by law.

VI. That the sum so exacted as aforesaid had not been repaid to the plaintiffs and is still due and owing to them.

Wherefore plaintiffs demand judgment against defendant for the sum of seventy cents ($.70), with interest thereon from the date of payment as it appears on said bill of particulars, together with the costs and disbursements of this action.

Dated New York, February 21, 1889.

A. P. KETCHUM,
Plaintiffs' Attorney; Office and P. O. Address,
4 William Street, New York City.

Name of importer (for all the importations), Kennedy & Moon.

Description of goods.	Name of vessel.	Whence imported.	Date of invoice.	Date of entry at custom-house.	Date of payment in excess.	Amount illegally exacted.	Protest filed.	Date of appeal to Secretary of the Treasury.	Date of Secretary's Decision.	Number of appeal.
2 packages of printed matter, marked "Thos. Cook & Sons."	Str. "Ohio"...	Liverpool..	None..	1888. Oct. 17	1888. Oct. 17	$ .70	1888. Oct. 17	1888. Oct. 17	1888. Dec. 8	Appeal 3075 T.

8 Endorsed: N. Y. supreme court, city and county of New York. Joseph S. Kennedy & ano., pl'ts'ffs, ag'st Daniel Magone, collector, &c., def't. 13663. Complaint and bill of particulars. A. P. Ketchum, counsellor-at-law, Cotton Exchange building, 4 William St., New York. 2722. Cal. No. —. Received, U. S. attorney's office, Mar. 4, 1889.

9 The President of the United States of America to the judges of the supreme court of the State of New York, Greeting:

We, for certain reasons, being desirous that our circuit court of the United States for the southern district of New York, in the second circuit, shall be certified of a certain cause commenced before you against Daniel Magone, defendant, by Joseph S. Kennedy & ano., plaintiffs, do therefore command you that the record and proceedings in the said cause you distinctly and openly send to the said circuit court, at the city of New York, on the 16th day of March, 1889, as fully and amply as the same are remaining before you, by whatever names the said parties may be called therein, together with this writ, that our said court may cause to be further done thereupon what of right ought to be done.

Witness Hon. Samuel F. Miller, senior associate justice of the Supreme Court of the United States, the 12th day of March, in the year one thousand eight hundred and eighty-nine.

JOHN A. SHIELDS, *Clerk.*

STEPHEN A. WALKER,
United States Attorney, Attorney for Defendant.

10 Endorsed: 13663. U. S. circuit court. Joseph S. Kennedy & ano. *vs.* Daniel Magone. Copy certiorari. Stephen A. Walker, U. S. attorney, attorney for defendant. Take notice that the within is a copy of a certiorari this day issued out of the circuit court of the United States for the southern district of New York. New York, March 12, 1889. Yours, Stephen A. Walker, U. S. attorney, attorney for defendant. To A. P. K. A copy of the within paper has been this day received at this office. Mar. 13, 1889. A. P. Ketchum, Cotton Exchange building, 4 William St., New York city. Due service of the within and of the above notice is hereby admitted. New York, March 12, 1889. W. H. S.

11 Circuit Court of the United States for the Southern District of New York.

JOSEPH S. KENNEDY *et al.*
versus
DANIEL MAGONE, Collector, etc. } N. S. 13663.

The defendant answers to the complaint as follows:

I. He denies that the true duty or that the true and lawful rate of duty on the goods referred to in the complaint was as stated in the complaint; and he denies that the plaintiffs were compelled to pay or did pay defendant, as collector or otherwise, the sum stated in the complaint, or any sum in excess of the amount required by law, as duties upon the said goods, or that any sum of money unau-

thorized by law was exacted as duties on said goods or otherwise, or that the same was paid in order to obtain possession of said goods.

II. He denies that the plaintiffs filed with defendant any protest or protests, as required by section 3011 of the Revised Statutes of the United States.

III. He denies that the sum stated in the complaint or any sum is now due and owing the plaintiffs.

IV. He denies that he has any knowledge or information sufficient to form a belief as to whether the goods alleged in the complaint to have been imported at the times therein mentioned were in fact such goods as are described in the said complaint.

12 V. And, further answering, he alleges that no protest was filed within ten days after the ascertainment and liquidation of the duties thereon.

VI. And, further answering, he alleges that no appeal was taken to the Secretary of the Treasury within thirty days after the date of the ascertainment and liquidation of duties thereon.

VII. And, further answering, he alleges that this action was not brought within ninety days after the decision by the Secretary of the Treasury on the appeal taken from the ascertainment and liquidation of duties thereon or within ninety days after payment of duties paid thereon after such decision.

VIII. And, further answering, he alleges that this action was brought without the decision of the Secretary of the Treasury on the appeal from the ascertainment and liquidation of duties thereon having been first had and without ninety days having elapsed from the date of such appeal.

IX. And, further answering, defendant alleges that all moneys received by him from the plaintiffs in respect of the importations in the complaint alleged to have been made were demanded of plaintiffs, and were by plaintiffs voluntarily paid to him, in his capacity as collector of customs, as and for duties due the United States on imported merchandise, and were forthwith, before the commencement of this action and before the receipt by defendant of any protest or objection on the part of the plaintiffs, paid over by

13 the defendant, in his official capacity aforesaid, to the United States and placed beyond his control.

X. And, further answering, defendant alleges that all moneys received by him from the plaintiffs in respect of the importations in the complaint alleged to have been made were sums due from plaintiffs to the United States as duties, according to the rate of duty imposed by law, upon articles of merchandise imported by plaintiffs and assessed with duty, and no other sums than duties regularly assessed and ascertained and liquidated according to law upon the plaintiffs' entry thereof were collected or received by defendant from the plaintiffs.

Wherefore defendant demands judgment that the complaint be dismissed with costs.

STEPHEN A. WALKER,
United States Attorney, Attorney for the Defendant.

Endorsed: 13663. U. S. circuit court, southern district of New York. J. S. Kennedy *et al. vs.* Daniel Magone, collector, etc. Copy. Answer. Stephen A. Walker, United States attorney, attorney for defendant. Sir: Please to take notice that the within is a copy of an answer this day filed in the office of the clerk of the circuit court of the United States for the southern district of New York. Dated New York, March 16th, 1889. Yours, etc., U. S. att'y & att'y for def't. To A. P. Ketchum, Esq., attorney for plaintiffs. Due service of a copy of an answer, of which the within is a copy, and of the above notice is hereby admitted. Dated New York, March 16th, 1889. A copy of the within paper has been this day received at this office. Mar. 16, 1889. A. P. Ketchum, Cotton Exchange building, 4 William St., New York city.

14 At a stated term of the circuit court of the United States of America for the southern district of New York, in the second circuit, held at the United States court-rooms, in the city of New York, on Thursday, the 6th day of February, in the year of our Lord one thousand eight hundred and ninety.

Present: The Honorable E. Henry Lacombe, circuit judge.

JOSEPH S. KENNEDY *et al.*
vs.
DANIEL MAGONE. } N. S. 13663.

Now come the plaintiffs, by Alexander P. Ketchum, Esq., their attorney, and move the trial of this cause.

Likewise comes the defendant, by William Wickham Smith, Esq., assistant United States attorney, his attorney.

Thereupon a jury is empaneled and the cause proceeds to trial.

After hearing the evidence of the plaintiffs the jury, on the 7th inst., by direction of the court, say that they find a verdict for the defendant, and so they say all.

On motion of Alexander P. Ketchum, Esq., ordered that the plaintiffs have a stay of sixty days in which to make and serve a case, with leave to turn the same into a bill of exceptions.

An abstract of the minutes.

[SEAL.] JOHN A. SHIELDS, *Clerk.*

15 United States Circuit Court, Southern District of New York.

JOSEPH S. KENNEDY *et al.*
vs.
DANIEL MAGONE. } Judgment, April 4th, 1891.

The issues in this action having been brought on for trial before Mr. Judge E. Henry Lacombe and a jury, at a circuit court of the October term, 1889, and the issues having been tried and a verdict for the defendant having been duly rendered on the 7th day of Feb'y, 1890, and his costs having been adjusted at $48.85:

Now, on motion of Edward Mitchell, United States attorney, for defendant—

It is adjudged that the defendant have judgment against the plaintiffs upon the issues in this action, and that he recover the sum of $48.85, his taxed costs, and have execution therefor.

Judgment signed this 4th day of April, 1891.

JOHN A. SHIELDS, *Clerk.*

16 Endorsed: 13663. United States circuit court. Joseph S. Kennedy *et al. vs.* Daniel Magone. Judgment-roll. Edward Mitchell, United States attorney, attorney for defendant. U. S. circuit court. Filed Apr. 4, 1891, 4 p. m. John A. Shields, clerk.

17 United States Circuit Court, Southern District of New York.

JOSEPH S. KENNEDY *et al.*
vs.
DANIEL MAGONE. } N. S. 13663.

Bill of Exceptions.

Afterwards, to wit, on the 6th day of February, 1890, at a stated term of this court began and held on the third Monday in October, 1889, before Hon. E. Henry Lacombe, circuit judge of the United States for the southern district of New York, before whom said suit was joined as between the parties aforesaid, as by record fully appears, came up to be tried by a jury duly impanelled and sworn for that purpose, the said plaintiffs being represented by Alexander P. Ketchum, Esq., and the said defendant by Edward Mitchell, Esq., U. S. attorney, and Wm. Wickham Smith, assistant U. S. attorney.

In the course of the trial the said counsel for the plaintiffs did take and allege sundry exceptions to the rulings, instructions, charge, and directions of the court, and to the refusal to give certain instructions and directions to the jury then and there prayed for by them; which exceptions are hereinafter severally set forth.

To maintain issue on the part of the plaintiffs they introduced testimony to show that on the 17th day of October, 1888, two packages of printed matter, brought by the steamer "Ohio" from Liverpool, were entered at the custom-house at the port of New
18 York by appraisement entry, and that on the same day seventy cents was paid by them to the collector, the same being unlawfully exacted from them as charges for cartage, storage, and labor incident to the appraisement in the U. S. public (appraisers') store.

The entry in question, marked Exhibit 1, and the cashier's ticket upon which the charge of seventy cents was paid, marked Exhibit 2, were then introduced in evidence, as follows:

EXHIBIT 1.

Order for Appraisement.

PORT OF NEW YORK,
COLLECTOR'S OFFICE, *Oct.* 3, 1888.

To the appraisers:

You will examine and report the contents and value of—

Marks and numbers.	Description of merchandise.
Thos. Cook & Sons	Two pkgs. periodicals.

imported by Kennedy & Moon in the str. Ohio, —— —— master, from L'pool.

J. QUACKENBUSH,
Deputy Collector.

Appraisers' Report.

In pursuance of your order we have examined the following-described merchandise and do certify the contents of the packages and the value thereof to be as follows, viz.:

19

Marks and numbers.	Description of merchandise.	Value.	Rate.
Thos. Cook & Sons, New York..	Printed matter..	$15	25%

Two pkgs.
Fifteen dollars.

J. A. C.
S.

£ 10 4.
Dm.
Examiner.
Oct. 8, '88.

C. A. STEVENS, *Appraiser.*

To the collector of customs.

Informal Entry.

Name: Kennedy & Moon.
Vessel: Str. Ohio.
Arrived: Ap'l, 1888.
Appo.
15. 25. 3.75.

C. G. C.

P. Oct. 17.

J. B. H.

Approved.

LEWIS McMULLEN, *Appraiser.*

20 (Endorsed.)

7480. 159,468.
Port of New York, Oct. 3, 1888.
No.: 263.
Name: Kennedy & Moon.
Per str. Ohio.
Date: Ap'l 30, 1888.
Application under oath to enter without invoice goods not exceeding $100 in value.
Stamp: Paid Oct. 17, 1888; arrived Ap'l 30, 1888.

(Sec. 2859, R. S.)

Application under Oath to Enter Without Invoice Goods Not Exceeding $100 *in Value.*

To the collector of customs, port of New York:

I, Wm. R. Moon, of the firm of Kennedy & Moon, do hereby make application on oath to enter without certified invoice add. Thos. Cook & Sons two packages periodicals imported by Kennedy & Moon in the str. Ohio, whereof —— ——, is master, from L'pool.

The grounds of this application are that no certified invoice of the goods above described has been received; that, to the
21 best of my knowledge, information, and belief the non-production of a verified invoice is unintentional, and that no previous consignment has been made to —— —— by the same shipper without a certified invoice, and that the priced set forth in the statement hereunto annexed show the actual cost or the foreign market value of the merchandise embraced therein, to the best of my knowledge, information, and belief.

(Signed) W. R. MOON.

Sworn to before me this 3 day of Oct., 1888.

M. S. SEARING, *Collector.*

EXHIBIT 2.

Pay to cashier. 803.

CUSTOM-HOUSE, NEW YORK, *Oct. 17th*, 1888.

Importer-: Kennedy & Moon.
Vessel: Ohio.
Where from: L'pool.

Charges on Examined Packages.

Add.:
Two pkgs. p't'd matter.

2 at 10	20
	20
	30
	70c.

(Several initial checks.)
(Stamped:) Paid Oct. 17, 1888.

The protest and appeal of the plaintiffs against said exaction, duly filed with the collector and Secretary of the Treasury on the 17th day of October, 1888, were then introduced in evidence and marked Exhibit 3, as follows:

22 EXHIBIT 3.

NEW YORK, *Oct. 18th*, 1888.

Hon. collector of customs, New York city.

SIR: We protest against your decision as to the charges imposed and exacted for cartage, storage, and labor on goods, wares, and merchandise ordered and sent by you to the United States public store for appraisement, the said goods, wares, and merchandise having been imported by and entered by us as follows:

Name of vessel.	No. of entry.	Date of importation.	Date of liquidation—*i. e.*, payment.	Marks and numbers on packages.	Amount of charges.
Str. Ohio.....	159,468	Ap'l 30, '88	Oct. 17, '88	2 pkgs., Thos. Cook & Sons.	$ .70

The law—sections 2859 and 2926, Revised Statutes—provides that imported merchandise may be entered by appraisement without invoice, and sections 2789, 2926, and 2963, Revised Statutes, that merchandise, the entry of which may be incomplete for want of particulars, shall be taken into the custody of the collector and conveyed to some warehouse or storehouse and there remain until the par-

ticulars shall be ascertained by exhibition of original invoice or by appraisement, as the case may be, at the expense and risk of the owner or consignee.

We therefore claim that there is no warrant of law for the exaction of charges of the character of those in question, except when incurred for the storage of merchandise awaiting appraisement or invoice, and that they are not chargeable to the importer where the merchandise is sent to the United States public store for appraisement purposes only, the United States public store being provided by law—section 2955, Revised Statutes—for appraisement purposes and not for storage of merchandise.

23 We pay the amounts exacted under compulsion solely to get the goods, and hereby give notice that we shall appeal from your decision to the Honorable Secretary of the Treasury.

We also claim that for each of said exactions you are liable, under section 2636, Revised Statutes, to a penalty of two hundred dollars, recoverable by us.

Respectfully,

KENNEDY & MOON,
By JOSEPH TRELOAR,
Attorney, No. 30 *Pine Street.*

NEW YORK, *October* 17*th*, 1888.

Hon. Secretary of the Treasury, Washington, D. C.

SIR: We appeal from the decision of the collector of customs at New York as to the charges exacted by him on the goods, wares, and merchandise specified in the foregoing protest and for the reasons therein stated.

Respectfully,

KENNEDY & MOON,
By JOSEPH TRELOAR,
Attorney, No. 30 *Pine Street.*

Appeal was duly made to the Secretary of the Treasury, and his decision thereupon, adverse to the plaintiffs, having been made on December 8th, 1888, suit was brought in due time, the charges referred to having been paid to the defendant as exacted.

The plaintiffs then introduced in evidence the vessel's general order, which was marked Exhibit 4, as follows:

24 EXHIBIT 4.

(Rev. Stats., secs. 2880, 2966.)

General Order to Send Merchandise to Public Store.

CUSTOM-HOUSE, PORT OF NEW YORK,
COLLECTOR'S OFFICE, *April* 30, 1888.

The inspector on board the S. S. Ohio, Sargent, master, from Liverpool, will allow to be landed and will send to the public store No. —, Jersey City stores, all merchandise for which no permit or order shall have been received by him contrary to this direction, except perishable articles, gunpowder, and explosive substances, and

neat cattle and hog products of Denmark and Sweden, which he will retain on board and send notice thereof to this office. He may allow to be landed potatoes or green fruit, provided a general permit to retain cargo on wharf be produced to him; the usual weighing, gauging, and measuring to be done before sending goods under this order.

F. J. DUNN,
Deputy Collector.

L. A. MAY,
D. Naval Officer, Inman Pier.

Fees, 20 cents.
U. S. custom-house, N. Y. Cashier's office. Paid. Apr. 30, 1888.
Fees received, 20 cts.
9.25. J. J. C.

This shows that the goods in connection with which the said charges were exacted had been sent from the vessel to the bonded warehouse designated by the collector as the general-order store, so called, prior to the appraisement entry.

The plaintiffs then offered in evidence the inspector's return, which was marked Exhibit 5, as follows:

EXHIBIT 5.

(*Extract from Inspector's Return.*)

Return of merchandise unladen under my inspection, pursuant to permits and orders for that purpose, from on board the S. S. Ohio, Sargent, master, from Liverpool; arrived, April 29th; discharged, May 2nd; returned, May 7th, 1888.

General-order Jersey City Stores.

Date of permit.	Marks.	Numbers & des. of pkgs.
	Thomas Cook & Son, 261 Broadway....	Two packages.

S'g'd by PATRICK JENNINGS AND CHAS. NIMMO, *Inspectors.*

(Endorsed.)

S. S. Ohio.

CUSTOM-HOUSE, PORT OF NEW YORK,
SURVEYOR'S OFFICE, *May* 21, 1888.

The within return has been examined and agrees with permits and receipts.

S. M. BLATCHFORD, *Surveyor.*

26 FREDERICK W. BROOKS, being duly sworn and examined as a witness for the plaintiffs, testified that said general order and inspectors' return indicate the discharge of the goods and the disposition made of them. The general order indicates the authority for the inspector in charge of the vessel to land the cargo as unclaimed goods or goods not entered. The vessel's general order is to land and send to the bonded warehouse—that is, the general-order store—all unclaimed goods or goods not entered.

"I have the transfer order from the general-order store to the public store."

The transfer order was produced, introduced in evidence, and marked Exhibit 6, as follows:

EXHIBIT 6.

Stamp, 20 cts. Appraise.

CUSTOM-HOUSE, NEW YORK,
COLLECTOR'S OFFICE, *Oct.* 3, 1888.

The inspector of the port will send to public store the following packages for examination, viz:

Thos. Cook & Son, two pkgs. (2) periodicals.

Paid Oct. 3, 1888.

Storekeeper, J. H.

Imported by Kennedy & Moon, —— ——, master, in the ship str. Ohio from L'pool.

J. QUACKENBUSH,
Deputy Collector.

Feb'y 5, 1890.

27 (Endorsed:) Jersey City stores. Entered Oct. 3, 1888. Transfer. F. N. M. Entered & transf'd October 6th, 1888. M. J. Cunningham, S. K. Entered & transferred. F. H. Bright, sup't. Reported as Thos. Cook & Son, 261 B'way. No Nos., 2 pkges. F. N. M., W. Send and return as found. C. O. R.

Witness, continuing, said: "I have not the final delivery order of the goods from the public store, as I understand that no delivery order is issued in a case of this kind. I have the permit. The permit is an order to the storekeeper at the public store to deliver to the importer the merchandise mentioned on the face of the permit, it being states thereon that the importer has paid the duty." Witness produced permit for goods involved in this case; which was introduced in evidence and marked Exhibit 7, as follows:

EXHIBIT 7.

Informal Entry and Permit on Appraisement. 410.

To the storekeeper: 159,468.

Kennedy & Moon having paid duty as per statement on appraisement No. 263, on merchandise contained in the following packages,

imported in the str. Ohio, —— ——, master, from L'pool, permission is hereby given to deliver the same, viz.:

28 Marks.	Numbers.	Description of packages and contents.	By whom examined.
Thos. Cook & Sons, New York.	5	Two packages printed matter, 2.	D. W. L., Oct. 8, '88.

(Various scroll checks.)
Delivered Oct. 18, 1888, U. S. public store.
Custom-house, New York, Oct. 17, 1888.
H. M. GURLEY,
Naval Officer.

O. W. J. SHUTZER,
Deputy Collector.

J. A. C. Fees, 20 cents.

(Endorsed.)

Notice.

Having filled out the blank attached to this permit, called the naval-office entry, this paper will be presented—
1st. To the store book-keeper for estimate of storage.
2nd. To entry clerk at free-permit desk for statement of duty. When ready for payment the entry will be found at the desk of the transit clerk.
3d. Pay-duty cashier's office.
4th. To deputy collector for signature to permit.
5th. To cashier naval office for record of payments.
6th. To deputy naval officer for signature to permit.

THOS. COOK & SON.

20
20
J. M. 30
—
70

Custom-house, N. Y., fifth division, Oct. 17, 1888. Public store charges.
Kennedy & Moon, Thos. Cook & Son. Show's U. S. Samples Express Co. Lim. Michael Snow, p't. 7752.
Permit.

29 Witness, continuing, said: "I think the permit you handed me was a delivery order. A delivery order is one thing and a permit is another. We have in the course of business at the custom-house a blank form, called a delivery order, which covers this specific purpose; but in practice, as far as I know, in a case of this

kind no delivery order is issued; nothing beyond the permit, and none would be required."

JOSEPH S. KENNEDY, being duly sworn and examined as a witness for the plaintiffs, testified as follows:

"I am one of the plaintiffs in this suit and was a partner of the other plaintiff, Mr. Wm. R. Moon, at the time of the entry referred to in this suit. My business is that of custom-house broker, in which business I have been engaged about 20 years. The nature of my business is to enter goods arriving from foreign ports at the custom-house under the laws prescribed by Congress, as interpreted by the Treasury Department; also to enter goods for export which are in transit through this country for foreign territory. With regard to imported goods, I see them through all the processes of the custom-house to their final delivery to the importer, paying the duty, the fees, and other exactions on their entry. With regard to the particular transaction involved in this suit, the goods on their first arrival in the United States were landed as unclaimed, there being no proper invoice to enter them on at the custom-house. Subsequently a bill of lading came to hand which gave us the right of title to the property, and to the collector our proof of ownership. The goods were consigned to Thomas Cook & Sons and endorsed by them to us; in other words, assigned to us, which is permissible under the statutes and regulations. The goods were then entered by a sworn application, in which we informed the collector that they were under $100 in value; that we had not at any time received a certified invoice, and that we did not have any other information regarding the same. We knew the goods were in the general-order store because of the fact that the vessel had arrived previously, and we knew that the goods could not have remained upon the wharf had the law been executed properly, as we believed it had been. We applied to the storekeeper's department for the record, which showed that the goods were in the Jersey City store. The permit was stamped or endorsed, as it is called, directing the storekeeper to transfer those particular goods on the permit issued by the collector, and to send them to the appraisers' stores. They were sent there by the storekeeper by the public trucks. They were then appraised on an appraisement order issued by the collector. They were found to be of less value than $100; therefore the appraiser proceeded, finished, and completed his part of the work by setting the value upon the goods, classifying them according to the tariff. The appraisement was then transmitted from the appraisers' department to the collector. After being registered there it was turned over to the applicant, who made the entry. After the entry was made it passed through the collector's office first, before the naval office, which has to countersign the action of the collector. The duty was estimated in both offices. The storage charged was made up in the collector's office—the storage, labor, and cartage for the retention of the goods at the public store or at the appraiser's department. The general-order store referred to in the exhibit is owned by private owners, the Government having an officer there

to look out for its interests, whose salary is paid by the proprietor of the warehouse, according to the law and regulations.

The fees I paid in connection with the transit and storage of the goods were as follows: The storage paid to the private proprietor of the warehouse in Jersey City, where the goods were stored as
31 unclaimed goods, amounted to $3.25; that was to reimburse the private proprietor for the cartage paid to the carmen for hauling the goods from the wharf to his warehouse, the labor of receiving the goods in and delivering them from the warehouse, and the storage for his own profit. There were two packages of printed matter. The cartage paid by the proprietor of the warehouse amounted to 25 cents; for labor in and out of the bonded warehouse, where the goods were stored as unclaimed, 50 cents; in the private bonded warehouse they remained during five months at a storage rate of 25 cents per month, aggregating $2.50. The total sum paid in this transaction was $3.25, which was demanded of us and which we paid, necessarily, in order to have the goods taken out of the possession of this United States bonded warehouse to be transferred to the appraiser's office for appraisement. The payments I have just referred to do not include the 70 cents in suit. That 70 cents was paid to the collector of the port of New York at a subsequent date. It was demanded and exacted of us simultaneously and at the time of the payment of the duty. I did not get the receipt for that 70 cents when it was paid—none that I could retain in my possession. The receipt given in such instances is simply the initial check of the official on the document, which is retained as a voucher. It is the cashier's ticket (Exhibit 2). It is also endorsed upon the delivery permit. Exhibit No. 2 is the ticket I refer to and on which I paid the 70 cents. I find here the notation which I have described. The notation as to the 70 cents is as follows:

Importer..... Kennedy & Moon.
Vessel..... Ohio.
Where from..... Liverpool.

32 Charges on examined packages:

Add. two pkges. p't'd matter, 2, at 10.....	20
	20
	30
Total.....	70 cts.

These were the charges which were exacted of me subsequently to the goods leaving the general-order store.

Q. You sometimes have had, have you not, goods at the general-order store that you presented an invoice for?

A. Yes.

Q. What has been the practice of the Government with respect to such an invoice?

A. Goods arriving at this port and sent to the warehouse as unclaimed and those entered upon invoice are similarly treated. By "en-

tered upon invoice" I mean that I first produced my invoice to the collector with the bill of lading. The entry is made up describing the character of the goods as known under the tariff. The duty is made up by the collector's department and verified by the naval office. The entry is sworn to. This is all done before the goods leave the general-order store. The entries are sworn to. Bonds are exacted to secure the duties to the Government in case there should be any excess over that which is estimated upon the entry, and a permit is issued for the transfer of the goods from the general-order store to the appraisers' department, and a like procedure is there had as in the case cited before, by examination and appraisement, to ascertain if the invoice is correct in all particulars. With the report of the appraiser it is transmitted to the collector's department, and he takes final action upon it for its liquidation. Prior, however, to the transfer of these goods from the general-order store to the appraisers' department similar storage charges are exacted, the rates of which are prescribed by certain regulations approved by
33 the Secretary of the Treasury. These storage charges were exacted in this case; but there are no storage charges exacted by the Government in a case where the goods are entered by invoice, while they are under appraisement at the appraisers' store. With regard to goods entered by invoice, these charges are not exacted. The overcharges which are exacted in a case like ours are never exacted in a case where an invoice is presented.

Q. Why were there three separate items, or why do you say "three separate items"?

A. To represent storage at the public store or appraiser's department, labor therein, and cartage from the general-order store or unclaimed warehouse to the appraiser's department. I do not remember the exact amount of each separate item, but I do remember that the total is 70 cents. It is customary to put those items upon an official paper. I have frequently seen such official paper. I recognize Exhibit No. 2 as one of them.

Q. Can you tell us now any more definitely as to the items of payment; in other words, how much for cartage, how much for storage, and how much for labor?

A. The storage item amounts to 20 cents; two months at 10 cents per month. That is for storage at the public store or appraiser's office. Labor, 20 cents; cartage from the unclaimed warehouse to the appraiser's store, 30 cents. That is from the general-order store for unclaimed goods to the appraiser's store. I have frequently had goods stored in the store at Jersey City where these goods were stored. That was a general-order store to my personal knowledge. When I spoke of public trucks I meant that public trucks, as I understand them in this instance, are the trucks employed by the Government to convey goods from place to place; in this instance from the United States bonded warehouse to the appraiser's store. The owners of these trucks are reimbursed by the Government
34 for the transactions done under orders issued by its executive officers, the rates being agreed upon between the contracting parties. The trucks are owned by persons who engage in trucking,

but who, nevertheless, are under general control of the Government and under the general orders of the government officers at this port. The entry in this case was left at the cashier's office and returned by the cashier on the receipt of duties and storage charges. The permit, after the duties were paid and the storage charges—those that are endorsed upon the permit, 20, 20, 30, 70, below the stamp, "Custom-house, N. Y., fifth division, Oct. 17, 1888—public store charges"—was returned to us by the cashier after receiving his official check certifying to the deputy collector and to the naval office that the duties and charges had been paid. It was then presented to the naval-office cashier, who checked on his cashier's sheets the fact that the duties and charges had been received by the collector's cashier. It was then presented to the naval officer for signature and returned to the deputy collector for his signature. The permit was then completed and ready to be presented to the storekeeper in charge of the United States public stores for delivery of the packages. It was then returned to us for that purpose. We delivered it and left it with the storekeeper in charge of the United States public stores, where the goods had been appraised. In this instance the storekeeper was the deputy collector who was assigned the duty in charge of the United States public stores, who acts for the collector in the receipt and delivery of merchandise. That is the officer to whom we finally delivered the permit and left it with. We received our goods which were then delivered to us by him. The transfer order referred to was left at the United States bonded warehouse in Jersey City referred to before as receiving goods from the vessel.

35 Upon cross-examination by the defendant's counsel, the witness stated that his memory was a little at fault when he interpreted the first item upon the cashier's slip (Exhibit 2). "2 at 10, 20," means "storage for two months." "I desire to correct it. I desire to state that the permit calls for two packages, and that the rate was ten cents per package instead of two months. I should have said two packages at ten cents per package." The Ohio (the vessel in which the goods came) makes her landing in Jersey City. I am not a practical surveyor, but, from observation, I should think it might be about 300 feet from the dock to the general warehouse at which these goods were stored—that is, from one to two city blocks. The cartage which I paid on these two packages from the warehouse in Jersey City to the public stores at 402 Washington street, in this city, was 30 cents.

Witness stated that as a custom-house broker he was familiar with the various checks and marks upon the appraisement entry (Exhibit 1). He stated that the examiner, in making his returns to the appraiser, dates his report October 8, 1888; but at what time the appraiser got through with it and transmitted it to the collector there is no evidence here to show, as far as he could see. He said, the date upon that paper is the return of the examiner who actually examined the goods and fixes the value on them.

The assistant appraiser signs it, following his examiner, and then the appraiser signs it, following his assistant.

The date put down, October 8, is not the date when the appraiser approved of that valuation and assessment. That is the date placed there by the examiner—the date that he made the valuation of the goods.

Q. Don't you know, as matter of fact, from your experience as a custom-house broker, that if that return was made by the
36 examiner on the 8th of October, that the entry would be thereupon transmitted to the custom-house and, in the ordinary course of business, would reach there on the 9th, and that on the 9th of October you could have gone there and paid your duties and got your goods? Is not that so?

A. As matter of theory, such a course might exist; as matter of fact, I cannot state.

Q. I do not ask you either as matter of fact or as matter of theory, but as a matter of general practice do you not know, from your experience as a custom-house broker, that if this entry had followed the ordinary course of business as between the appraiser's office and the custom-house that that entry would have reached the custom-house on the 9th of October and that the importer could then have paid the duty and got the goods?

A. If it had been followed up as closely as that such a thing could have taken place.

Q. Is not that the general practice?

A. That is not the general rule.

(The plaintiffs' counsel here admits that after the return is made to the collector—not after the examiner's paper is signed, but after the return is made to the collector—if within forty-eight hours the importer does not take his goods, then they are sent away again to the general-order stores. He pays storage on them because of his neglect.)

The witness did not know, as a matter of fact, when that entry reached the custom-house.

Upon redirect examination the witness continued: That transfer order (Exhibit 6) was left at the Jersey City warehouse, directed to the United States Government storekeeper—not to the private bonded warehouse storekeeper, but to the United States Government storekeeper, and by him it is acted upon. That was left at the Jersey City store with the man who represents the Government.

37 FREDERICK W. BROOKS was recalled for the plaintiff and stated that he was and had been for many years in the collector's office as liquidator and had a very good knowledge of the customs laws relating to the entries of goods, and also knew about warehouses of all kinds and public stores, &c. He stated that the store referred to in Jersey City was a bonded warehouse, used for the storage of merchandise on which duty has not been paid. It is owned or leased by an individual, a corporation, or a firm. He said I am unable to state who are the actual owners of the bonded warehouse, but it is not owned by the Government. I do not know

who stands on the record of the custom-house as the private owner or proprietor of this warehouse.

(Defendant's counsel admits that this is a private bonded warehouse.)

Witness continues: It is a warehouse of class 3, but at the same time it is a warehouse of class 2, because it is designated by the collector as a warehouse within which shall be stored unclaimed merchandise within that particular district.

These goods were landed in Jersey City.

The difference between the store in Jersey City and the public store is as follows:

The store in Jersey City is one which is owned or controlled by an individual or a firm or a corporation as a public warehouse for the storage of bonded merchandise—that is, merchandise upon which the duties have not been paid, and also in this case the store is also a warehouse which has been indicated by the collector as the warehouse to which what is called "unclaimed merchandise" shall be sent, or a "general-order store;" the public store is a store which is controlled by the Government, by the collector, and is under his immediate jurisdiction and under his complete control. The
38 Government is the proprietor, the lessee of the building which is known as the United States appraiser's public stores. I mean when I say "bonded warehouse" that the proprietor has had to give a bond to the Government for the privilege of storing such goods as you have described.

The public stores comprise two divisions. One portion is under the immediate control of the collector, and is the part where goods are received which have been sent there for examination or for any other purpose by order of the collector and from which such goods are delivered, and another portion is set off as the portion in which the appraiser examines all imported merchandise sent there for examination. Goods are sent there for appraisement and for suggestions as to classification, and, as far as concerns that part of the store which is under the immediate control of the appraiser, for these purposes only.

There are cases which arise now and then where the goods are sent to the public stores by order of the collector for other purposes.

Q. For what purposes, for example?

A. There are cases which arise where the collector may think it advisable to take possession of the imported merchandise for any reason whatever for conclusions satisfactory to him, as, for instance, in certain cases he will frequently send imported merchandise to the public stores for custody, that being, perhaps, the most convenient place where he can store it while he desires to retain control of it—not necessarily merchandise which has been seized, although such merchandise is frequently sent to the stores, but, generally speaking, seizes merchandise — is sent to the seizure-room, which is not within the public stores. I mean goods which the collector may desire to retain. There are questions which arise sometimes in connection with imported merchandise where the collector

39 does not desire to seize it, but he desires to detain the merchandise in order that he may investigate something in connection with it which may possibly lead to a seizure or to some other proceeding. I mean to retain the merchandise after it gets to the public stores. One of the cases which may arise is where the examiner has reason to suppose that there has been fraudulent undervaluation. This is not always in connection with the examination and appraisement of packages which has been ordered into the public stores. I have known of cases where the collector has sent imported merchandise to the public stores as a place of custody. The Boyd glass case might be an example. In this case the plates of glass were so large that there was no other place than the area of the yard of the public stores where they could be put, and even then they had to cut down a part in order to get them in there. There are a great many other cases. But it is an exceptional thing.

PLAINTIFFS' COUNSEL: Now, you will please explain to us for what purposes the Appraiser's building, at 402 Washington street, is used.

DEFENDANT'S COUNSEL: I object to this general line of testimony by the witness in explanation of the character of these various warehouses and the customs therein, on the ground that the rules governing them are fully prescribed and set out at great length in the regulations of the Treasury Department which, by statute, are made the law governing warehouses.

(Objection overruled.)

A. When you speak of the Appraiser's building I presume you refer to that part of the public stores which is used by the appraiser?

Q. I refer to the whole block of buildings, the whole build-
40 ing which is known as the Public Stores and United States Appraiser's Office.

A. The building used as a public store and appraiser's office is used first for the reception, in the part known as the public store, of imported merchandise which has been sent to the public stores for examination by order of the collector, or which has been sent there by the collector for any other purpose; secondly, for the delivery of such merchandise after the collector has allowed its delivery by permit or delivery order, and the portion occupied by the appraiser is used by him in the examination of merchandise sent to him by the collector for examination.

Q. The merchandise that the deputy collector receives there, as the representative of the collector, is merchandise ordered to that building and afterwards to be under the observation and consideration of the appraiser or of his assistants. Is it or is it not?

A. It is, in part.

Q. And otherwise, how?

A. Otherwise there are frequent occasions when the collector sends merchandise to the public stores which is not intended to be examined by the appraiser.

Q. But I have understood you to say, the object is that he may hold it for the purpose of possible seizure?

A. He may hold it for such purpose as he may think proper.

Q. When goods are unclaimed and have to be stored, are they ever sent to the public store?

(Objected to as immaterial. Question excluded. Exception by plaintiffs.)

Q. Where are they sent?

A. The goods which are technically known as unclaimed goods are, in almost all cases, sent to what is known as the general-order warehouse. Bonded goods are never sent to the appraiser's
41 stores for storage under the bonding system. Exhibit 4 is signed by deputy collector and the store is designated there, to which the goods in question were to be sent. It is the store which has been spoken of in Jersey City.

FRANK H. BRIGHT, being duly sworn and examined as a witness for the plaintiffs, testified that he was superintendent of the aforementioned store in Jersey City, and that he had heard all the foregoing testimony. He said, The proprietor of those stores is a corporation, by which I am employed as superintendent. Goods are sent there by the United States for storage and are afterwards taken away. The payment of charges is required before permitting the goods to be taken away. The charges depend altogether upon the class of goods. As to the class of goods involved in this controversy, we have but one class of items to charge, and that is for storage, labor, cartage, and advance and sometimes cooperage, if necessary.

Q. Do you remember the items of such charges in connection with the entry under consideration?

A. I recollect the invoice or at least the packages that were sent under the general order and which no doubt you refer to.

Q. Can you, by looking at this paper, refresh your memory as to the exact items?

A. Yes, sir.

Q. Can you give us the exact items?

A. Yes.

Q. What are they?

A. Two packages, five months' storage, amounting to $2.50; labor thereon, 50 cents; cartage advanced, 25 cents. That was cartage from the piers to the warehouse or from the steamer to the warehouse. I did not deliver the goods in question until after
42 those charges were paid. After that I delivered them. If we have room in the warehouse we are obliged to receive all unclaimed goods sent by the collector. I have always acted on that supposition. I am required to exact payment for my charges before the goods leave the warehouse. These goods pursued the usual course of business.

HAMILTON FULTON, being sworn and examined as a witness for the plaintiffs, stated: I am a clerk at the custom-house. This is a

cashier's ticket which is in evidence (referring to Exhibit 2). It is in my handwriting. The items of charges mentioned thereon are as follows: There is storage, 10 cents per package; two packages, at 10 cents, 20 cents; labor, 10 cents per package; two packages, 20 cents; cartage, 15 cents per package; two packages, 30 cents; total, 70 cents. The storage charge was for storage of goods at the public stores. The rule is that on all packages that are sent into the appraiser's stores for examination or appraisement there is storage—storage rate and cartage—under appraisement order or free or defective invoices and where there is no invoice. Ordinarily on goods which are entered for consumption with an invoice—packages sent from the dock to the Appraiser's building—there would be no charge at all for cartage, nor for storage, either, if there was a straight invoice. That 10 cents is payment for one month. That does not state how long they were there, but we charge one month's storage whether they were there two days or one day or half a day or twenty minutes. If goods are going to a public store the storage is made up. If we stop the goods at the warehouse before the party can take the goods out they must pay storage on the packages which have been in the public store, providing they are not on straight invoices; on straight invoices there is no storage charge nor any other charge.

43 Upon cross-examination witness stated that it is the universal practice of all warehouses to charge one month's storage for the first month or any fraction of a month; after the first month they charge for half a month, so that if the goods are in the warehouse a month and two days they charge for a month and a half storage.

A "straight invoice" is where an invoice describes the contents of each and every package, giving its value and all the particulars. An invoice which does not give the contents of each and every package is not a "straight invoice." We call it a "defective invoice." Upon goods entered upon such an invoice it is the practice of the Government to exact storage charges.

Upon redirect examination witness states that he makes this exaction for storage upon the authority of his superiors, who order it done. Where goods are worth less than $100 it is not necessary to have an invoice, although there may be one.

JOHN QUACKENBUSH, being sworn and examined as a witness for the plaintiffs, testified that he had acted as deputy collector in the collector's office of this port for over twenty years.

Upon being shown Exhibit 6 witness stated: This is an order directed to the inspector or storekeeper—this has been changed from "inspector" to "storekeeper"—to send to the public store for examination two packages of periodicals, imported by Kennedy & Moon in the steamship Ohio from Liverpool, dated October 3rd, 1888, and signed by me as deputy collector. "For examination" means for appraisement and classification by the appraiser; and after the appraiser examines and classifies the merchandise, upon his classification, when returned to the custom-house, the collector

assesses the duty, and it is for that purpose that the goods
44 must be examined by the appraiser and classified by him.
The deputy collector's object in this order is the transfer of those packages to the public store.

Upon cross-examination witness continues: When goods are imported into this port and entered by "straight invoice," it is the practice to send to the public store for examination one package from each invoice at any rate, and at least one out of every ten. Sometimes all the packages are sent to the public store, but it is not usual. Where the importation or consignment is without an invoice and consists of a number of packages, all the packages, no matter how numerous, must be sent to the public store, because if there is no valuation given, then it is the appraiser's business to ascertain the amount.

Upon redirect examination witness stated that the number of packages in this case was very small—only two.

Q. When goods are entered for consumption, suppose we have an entry of fifty cases of velvets, for example, and the collector of the port has got an idea beforehand, through correspondents, that suspicion attaches or will attach to the invoices of those goods, and he directs that the entire fifty cases be sent immediately from the dock to the appraiser's store, now who pays the cartage?

(Objected to as being a hypothetical question and as immaterial. Question allowed.)

A. Whenever, for any cause, the collector or one of his deputies who act for him have reason to suspect the authenticity or correctness of an invoice, or wherever there is a failure upon the part of the importer to present a proper specification and detail of contents and value, the packages are all ordered to the public store, and it is customary for the collector's clerk, acting for him, to endorse on the back of the invoice beneath their stamp, "all for storage." They
45 order all, as designated by numbers, to be sent, and mark at the end of it "storage," meaning that all are to go to the public store and be charged storage.

If I ordered a case there and the invoice was entirely correct upon the face of it I should not order the storage paid. As to cartage, I cannot tell you anything, that not being within my line. The term "storage" does not, I think, include the three items of storage, cartage, and labor.

Plaintiffs' counsel requested that the Treasury regulations with regard to warehouse appear as a part of the record in this case. The defendant's counsel declaring his willingness and the court calling for the paragraphs, the plaintiffs' counsel names pages 253, 254, and 255 of the Treasury regulations, as follows:

Warehousing, Transportation, and Exportation of Merchandise in Bond—Transportation to, from, and through Canada and Mexico.

CHAPTER I.

Warehouses.

Classification of Warehouses.

Art. 617. Warehouses for the storage of imported dutiable goods shall be known and designated as follows, R. S. 2989:

Class I. Stores occupied by the United States.

Class II. Warehouses occupied by importers exclusively for the storage of goods imported by or consigned to them or purchased by them in bond.

Class III. Warehouses occupied for the general storage of imported goods.

Class IV. Yards or sheds for the storage of heavy and bulky imported goods.

Class V. Bins or parts of buildings for the storage of imported grain.

46 Class VI. Warehouses exclusively for the manufacture of medicines, cosmetics, and the like, and warehouses exclusively for the cleansing of imported rice for exportation.

Warehouses of class I.

Art. 618. At ports where there are Government stores preference should be given to them for the storage of seized goods and of unclaimed goods, if there is sufficient space therein. Where there are no such stores such goods may be deposited, by order of the collector, in warehouses of class III.

At ports where there are no class III warehouses the collector may, with the approval of the Secretary of the Treasury, procure suitable premises for the temporary storage of unclaimed goods. R. S., 2954.

The labor in these stores shall be performed under the superintendence of the officer in charge, at the expense of the owner or importer of the merchandise, and charges for storage and labor and other expenses accruing on the goods shall not exceed the usual rates at the port where incurred. R. S., 2965.

Warehouses of class II.

Art. 619. The entire building shall be appropriated to the purposes above designated for warehouses of this class, and for the time of the customs officer necessarily required in attendance at such warehouse the proprietor shall pay, monthly, to the collector of the port such sum as the latter may deem proper for the service—not less, however, than the pay of such officer or a proper proportion of the same in case an officer has in charge more than one ware-

house, and the labor on goods stored therein shall be done at the expense of the importer and under the supervision of the officer in charge.

47 Cellars and vaults may, in the discretion of the Secretary of the Treasury, be bonded under this class for the storage of wines and distilled spirits only. R. S., 2958 and 2960.

The locks used by the importer and those used by the customs officers for such warehouses must differ in character. S., 2629.

Warehouses of class III.

Art. 620. A warehouse of class III shall consist of an entire building, used solely for the storage of bonded merchandise and of unclaimed and seized goods ordered thereto by the collector. R. S., 2960; S., 3608.

And the rates of storage and compensation for labor in the handling of bonded goods will be as agreed on between the owner or importer of the goods and the proprietor of the warehouse, who will receive all amounts due for storage and labor, the collector looking to the safe custody of the goods only for the security of the revenue.

The proprietor of such warehouse is liable, as in other cases, for the safe-keeping of unclaimed and seized goods, the charges on which for labor, storage, and other expenses are not to exceed regular rates.

The collector or chief customs officer of the port shall determine the correctness of such charges when disputed. Such goods shall not be withdrawn without payment of the proper charges.

Every warehouse of this class must be placed in charge of an officer of the customs, under the separate and different locks of the custom-house and of the proprietor.

An additional officer or officers may be assigned for duty at any one warehouse when the collector deems the same necessary.

The proprietor of every such warehouse will be required
48 to pay monthly to the collector a sum equal to the salary of the officer or officers assigned to such warehouse and to provide at all times a suitable office therein for his or their accommodation. R. S., 2960.

Warehouses of class IV.

Art. 621. Warehouses of class IV are to be used exclusively for the storage of wood, coal, mahogany, dye-woods, lumber, molasses, sugar in hogsheads and tierces, railroad, pig, and bar iron, anchors, chain-cables, and other heavy or bulky articles, when specially authorized to be sent thereto. R. S., 2958.

The yards must be enclosed with substantial fences, not less than twelve feet in height, with entrance gates opening into a street or public way and provided with suitable bars and other fastenings, so as to admit of being secured by customs locks.

Sheds, when required, must be constructed within the limits of

the yard and in such manner as to protect the goods to be stored therein from injury.

The doors and other openings must be provided with suitable fastenings and secured by the different and separate locks of the occupant and the customs; and the occupant shall provide a proper room for the use of the officer in charge.

The collector may order unclaimed and seized merchandise of the description above enumerated to warehouses of this class under the same regulations and conditions as are provided for the deposit of unclaimed or seized goods in warehouses of class III.

Warehouses of class V.

Art. 622. Bins or parts of warehouses or elevators may be bonded for the storage of grain only. The bonded portions must be
49 separated from the rest of the building and all openings and entrances properly secured as in other cases R. S., 2959.

A warehouse of class IV or of class V may be bonded as of class II exclusively for the storage of goods imported by the proprietor thereof, in which case it will be designated as an importer's warehouse of class IV or V, as the case may be.

Warehouse of class VI.

Art. 623. A warehouse of class VI is to be used for the manufacture of medicines, preparations, compositions, perfumery, cosmetics, cordials, and other liquors from domestic spirits, or imported merchandise in bond and intended for exportation. Such warehouse shall be situated at a port of entry, and shall consist of an entire building, as in the case of bonded warehouses of class II. R. S., 3434.

Warehouses of class VI may also be established, to be used exclusively for the storage and cleansing of imported rice intended for exportation to foreign countries. 18 Stat., 24, sec. 1.

Herewith plaintiffs rest.

ALBERT B. HARDY, being sworn and examined as a witness for the defendant, testified that he had been a clerk in the custom-house for more than a year and a half, and was there in October, 1888. He kept the book called "Record of Appraisement Orders." In that book we make a memorandum of appraisements as they go to the public store, and we also enter there the time they come back. Being shown the said book, witness read under date of October 3rd: "October 3d, Kennedy & Moon, steamer Ohio, appraisement No. 263." It went up to the appraiser's stores October 3rd and returned October 9th. It was receipted for by Kennedy & Moon and an entry made, No. 159,468. The entry in this case is the
50 same, and this record was made by me.

Upon cross-examination witness stated that the record shows that the appraisement order (Exhibit 1) went from the custom-house to the public store on October 3rd, 1888, and was returned to the custom-

house on October 9th, 1888. He said, I am not positive, but I suppose the goods were in the public store when the paper was issued. Sometimes I receive back this paper marked "Goods not in store." This order when it comes back is called "the return." It reached me the same day that it left the public store. There is nothing on this paper that tells me when the action of the appraiser was completed with respect to the valuation of those goods, nor is there anything to indicate to me how long it took the examiner to investigate or examine, except the record on this book that he did it between October 3rd and October 9th. That is all the record I have of it.

Sometimes it is even longer than that before I get the appraiser's order back again—sometimes a month, sometimes a few days. I have seen them go up and come down the same day, but not often. Sometimes where somebody has got a trunk that has something valuable in it just brought on shore and which he is in a great hurry to get home; sometimes a live dog. I mention live dogs for the reason that we have a great many of those. They get them made special. How soon after the return had been entered in the book the importer could have come and paid his duties and received his goods depends altogether upon the time that the broker receipts for this paper. He generally receipts for it the same day it comes back. This was returned on October 9th. I suppose the general practice is that the broker would come up that same day, receipt and take away the paper. He could have come that very day and could have got the paper that day. I do not know the time of day when I received that paper, but unless he got there before three o'clock he could not have got the paper. There is nothing
51 to show the time of day when I received the order.

At this point the defendant rested the case and moved the court to direct a verdict in favor of the defendant upon the ground that the proofs in the case and the law as applied to those proofs show that the seventy cents which plaintiffs seek to recover in this case *was* properly exacted by the collector. Pending argument on the motion for a direction of verdict, the court adjourned to February 7th, 1890, at 11 a. m.

The hearing being resumed on that date, after further argument, the court granted the motion of the defendant and directed a verdict for the defendant as follows:

This case, of course, is to be determined according to its own facts and the law is to be interpreted only so far as it has a bearing upon and connection with those facts. The charges here complained of were those which made it possible and practicable for the appraisers, in accordance with the provisions of law which require them to discharge their functions in a single building in the city of New York, to so discharge those functions touching these goods. In this instance they did not discharge those functions solely in a scrutiny of the goods to determine whether or not there was some fraudulent (or honest) undervaluation. In this particular case there was no declared value which they set about to revise. The importer was either unable or unwilling to state value. For

what reason it is unnecessary to enquire. Whether by so doing, as was suggested by counsel for defendant, he saved three or four times as much as this fee by not having paid consular fees in London, Liverpool, Glasgow, or wherever the goods came from, or for whatever reason, he had put himself in such a position that it became necessary for him under the law to ask the assistance of the General Government to make his own declaration as to value in this case.

52 I see no reason why for services of that kind (requested by him from the General Government, and which he need not have requested if he had taken the trouble to provide himself with an invoice on the other side) he should not himself pay; for that reason I shall direct a verdict for the defendant.

To which direction and ruling of the court the plaintiffs duly excepted.

Further the plaintiffs' counsel also requested that they might go to the jury on the question involved and on all the evidence in the case.

This motion being denied, the plaintiffs duly excepted and asked for a stay of proceedings.

The jury thereupon, under direction of the court, found a verdict for the defendant, and, inasmuch as none of such exceptions, matters, and things would otherwise appear by the record of said trial, therefore by the prayer of the plaintiffs, by their counsel, the said judge has settled, allowed, and signed this bill of exceptions and ordered that the same be filed with like force and effect as if it had been reduced to writing, signed, and filed before the case was given to the jury.

Witness my hand this 24th day of March, 1891.

E. HENRY LACOMBE.

Endorsed: U. S. circuit court, southern district of New York. 13663. Joseph S. Kennedy *et al.*, plaintiff-, against Daniel Magone, defendant. Bill of exceptions. A. P. Ketchum, attorney for plaintiffs, 4 William St., New York city (Cotton exchange). U. S. circuit court. Filed Mar. 24, 1891. John A. Shields, clerk.

53 Supreme Court of the United States.

JOSEPH S. KENNEDY and WILLIAM R. MOON, Plaintiffs in Error, *vs.* DANIEL MAGONE, Defendant in Error. } Assignment of Errors.

Afterwards, to wit, on the twentieth day of July, 1891, before the justices of the said court, at the Capitol in Washington, come the said plaintiff- in error, by A. P. Ketchum, Esq., their attorney, and say that in the record and proceedings aforesaid there is manifest error in this, to wit, that by the record aforesaid it appears that the judgment aforesaid, in form aforesaid given, was given for the said defendant in error against the said plaintiffs in error, whereas by the law of the land the said judgment ought to have been given for the said plaintiffs against the said defendant.

And the said plaintiffs pray that the judgment aforesaid for the error aforesaid and other errors in the record and proceedings aforesaid may be reversed, annulled, and altogether held for nothing, and that (they) the said plaintiffs may be restored to all things which (they) (have) lost by occasion of said judgment, &c.

Dated June 25th, 1891.

A. P. KETCHUM,
Att'y for Joseph S. Kennedy & William R. Moon,
Plaintiffs in Error.

54 [Endorsed:] 13663. United States Supreme Court. Joseph S. Kennedy and William R. Moon, plaintiffs in error, *vs.* Daniel Magone, defendant in error. Assignment of error. A. P. Ketchum, attorney for plaintiffs in error. Due service of a copy of the within assignment of error is hereby admitted this 25th day of June, 1891. Edward Mitchell, attorney for defendant in error. To Edward Mitchell, Esq., attorney for defendant in error. Original filed June 25, 1891.

55 Supreme Court of the United States.

JOSEPH S. KENNEDY and WILLIAM R. MOON,
Plaintiffs in Error,
vs.
DANIEL MAGONE, Defendant in Error.
} Joinder in Error.

And afterwards, to wit, on the twentieth day of July, 1891, the said defendant in error, by Edward Mitchell, U. S. att'y, his attorney, comes here into court and says that there is no error either in the record or proceedings aforesaid or in the giving of the judgment aforesaid.

And he prays that the said Supreme Court, before the justices thereof now here, may proceed to examine as well the record and proceedings aforesaid as the matters aforesaid above assigned for error, and that the judgment aforesaid, in form aforesaid given, may be in all things affirmed, &c.

EDWARD MITCHELL,
U. S. Attorney, Attorney for Defendant in Error.

56 [Endorsed:] 13663. United States Supreme Court. Joseph S. Kennedy *et al.*, plaintiffs in error, *vs.* Daniel Magone, defendant in error. Joinder in error. Edward Mitchell, U. S. att'y, attorney for defendant in error. Due service of a copy of the within joinder in error is hereby admitted this 25 day of June, 1891. A. P. Ketchum, attorney for plaintiffs in error. To A. P. Ketchum, Esq., attorney for plaintiffs in error. Original filed June 25, 1891.

57 Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

JOSEPH S. KENNEDY and WILLIAM R. MOON *vs.* DANIEL MAGONE. } Bond for Damages and Costs.

Know all men by these presents that we, Frederick J. Stokes and Alexander P. Ketchum, of the city of New York, are held and firmly bound unto the above-named Daniel Magone in the sum of one hundred dollars, to be paid to the said Daniel Magone; for the payment of which, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated the twenty-fifth day of June, in the year of our Lord one thousand eight hundred and ninety-one.

Whereas the above-named Joseph S. Kennedy & William R. Moon have prosecuted their writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled suit by the judge of the circuit court of the United States for the southern district of New York:

Now, therefore, the condition of this obligation is such that if the above-named Joseph S. Kennedy and William R. Moon shall prosecute their said writ of error to effect and answer all damages and costs if they fail to make said writ of error good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

FRED. J. STOKES. [SEAL.]
ALEXANDER P. KETCHUM. [SEAL.]

Sealed and delivered and taken and acknowledged this 25th day of June, 1891, before me—

EDGAR KETCHUM,
Notary Public, N. Y. County.

58 UNITED STATES OF AMERICA, *Southern District of New York,* } *ss:*

Frederick J. Stokes and Alexander P. Ketchum, of the city of New York, being duly sworn, depose and say, each for himself, that he is worth the sum of two hundred dollars over and above all his just debts and liabilities.

FRED. J. STOKES.
ALEXANDER P. KETCHUM.

Sworn to this 25th day of June, A. D. 1891, before me—

EDGAR KETCHUM,
[SEAL.] *Notary Public, N. Y. County.*

[Endorsed:] U. S. circuit court, southern district of New York. Joseph S. Kennedy and William R. Moon *vs.* Daniel Magone. Bond for damages and costs on. Approved June 25, 1891. E. Henry Lacombe. U. S. circuit court. Filed June 25, 1891. John A. Shields, clerk.

59 UNITED STATES OF AMERICA, *ss:*

To Hon. Daniel Magone, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the twentieth day of July, eighteen hundred and ninety-one, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the southern district of New York, wherein Joseph S. Kennedy and William R. Moon are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Dated June 25th, 1891.

E. HENRY LACOMBE.

60 [Endorsed:] E. & A. B., 1011. 13663. U. S. Supreme Court. Joseph S. Kennedy and William R. Moon, plaintiffs in error, against Daniel Magone, defendant in error. Citation. A. P. Ketchum, attorney for plaintiffs in error. Due service of a copy of the within citation is hereby admitted this 25 day of June, 1891. Edward Mitchell, U. S. att'y & attorney for defendant in error. P. 10 p'd. U. S. circuit court. Filed June 25, 1891. John A. Shields, clerk.

Endorsed on cover: Case No. 14,748. S. New York C. C. U. S. No. 232. Joseph S. Kennedy and William R. Moon, plaintiffs in error, *vs.* Daniel Magone, collector of the port of New York. Filed July 17, 1891.

MAR 7 1895
JAMES H. McKENNEY
CLERK

158 212

Supreme Court of the United States.

OCTOBER TERM, 1894.

No. 232.

JOSEPH S. KENNEDY and WILLIAM R. MOON,
Plaintiffs in Error,

vs.

DANIEL MAGONE, Collector of the Port of New York.

PLAINTIFFS' BRIEF.

A. P. KETCHUM,
4 WILLIAM STREET,
Attorney for Plaintiffs.

C. G. Burgoyne, Walker and Centre Streets, New York.

Supreme Court of the United States.

JOSEPH S. KENNEDY and WILLIAM R. MOON, Plaintiffs in Error, AGAINST DANIEL MAGONE, Collector of the Port of New York.	No. 232, October Term, 1894.

BRIEF FOR PLAINTIFFS IN ERROR.

Statement.

This writ of error is brought to review a judgment (1891) of the U. S. Circuit Court at New York, rendered upon a verdict for the defendant where the trial Court refused to submit the evidence to the jury and directed a verdict for defendant. Against these rulings error is assigned.

An importation of certain foreign merchandise, of a value less than one hundred dollars, was sent when landed from the import vessel to a U. S. bonded warehouse for storage as unclaimed merchandise. The defendant, as customs collector, ordered the transfer of the merchandise from the bonded warehouse to the appraiser's stores for appraisement and had exacted from plaintiffs certain alleged charges, or fees for alleged storage and labor *at* the appraiser's stores and cartage of the merchandise from the bonded warehouse (Rec.,

fol. 33) *to* the appraiser's store, amounting altogether to 70 cents, paid under the statutory protest and appeal (Rec., fol. 23). The plaintiffs had already paid, as they claim, to the proprietors of the U. S. bonded warehouse all the proper charges for storage, labor and cartage in amount $3.25, constituting, as they claim, the only set of transit and storage charges lawfully chargeable under the circumstances of this case (Section 2965, U. S. Revised Statutes).

The legality of the second set of transit and storage charges made in connection with the appraisement is at issue here. The plaintiffs in error claim that upon an importation of goods in value less than $100 there is no authority whatever for the exaction in question. In the case at bar, as the proofs show, had there been an invoice presented on entry, instead of the prescribed sworn application "to enter without invoice goods not exceeding $100 in value" (Rec., fols. 21 and 30), the charges paid for the transfer of the goods from the U. S. bonded warehouse for appraisement would not have been exacted according to the Custom House practice.

The plaintiffs in error claim that, in respect to goods valued at less than $100, they have the statutory right under the circumstances detailed to have the merchandise and customs papers relating thereto subjected to no other or greater burdens than would be applicable to merchandise valued beyond $100 which may be accompanied by an invoice for the transfer of which from bonded warehouse or import vessel for appraisement no charge is made for cartage, storage or labor.

The plaintiffs claim is that, under the statute, as well as under the Treasury regulations, there is no basis to discriminate to their prejudice by double transit and storage charges. The payment in question is not in return for some favor asked for and received, as erroneously intimated by the trial Judge. It was a matter of statutory right to proceed without an invoice, as plaintiffs did proceed, and the absence of an invoice

for goods valued under $100 occasioned no request for favor, no payment for an alleged favor, and warranted no adverse discrimination as represented by the charges in suit.

Assignments of Error.

FIRST. The plaintiffs in error allege error in that the trial Court refused their request " that they might go to the jury on the question involved, and on all the evidence in the case ; " to which refusal exception was taken (Rec., fol. 52).

SECOND. To the direction of the Court under plaintiff's exception to the jury to find a verdict for the defendant (Rec., fol. 52).

Points and Argument.

I.

Foreign merchandise is, in the language of the statutes applicable to its disposition on arriving in port, " admitted to entry " by the Collector of the port on the application of the importer in the methods prescribed by law. This " admission to entry " is ordinarily based upon an application in such form as the circumstances of the case may require, accompanied by a prescribed invoice (Section 2785, U. S. Revised Statutes).

There is a special exception in this respect exclusively applicable to merchandise the value of which does not exceed $100.

United States Revised Statutes, Section 2859, provides that " whenever the value of the imported mer- " chandise does not exceed $100, the Collector may

" admit it to entry without the production of the tripli-
" cate invoice, and without submitting the question to
" the Secretary of the Treasury, if he is satisfied that
" the neglect to produce such invoice was unintentional,
" and that the importation was made in good faith and
" without any purpose of defrauding or evading the
" revenue laws." The Secretary of the Treasury, as it appears from the record in this case (Rec., fols. 20, 21), has established a form of an affidavit to be made for carrying out this provision of the statutes, and this form was used in the case at bar. The usual affidavit was made as per the said form prescribed, and the merchandise was "admitted to entry" by the collector in the usual way, *i. e.*, by appraisement without the production of an invoice.

A contention of the plaintiffs in error is that they, as importers of the merchandise in question, it being valued at less than $100, were entitled to the same rights and privileges in respect to its disposition, appraisement and delivery from the Government's custody as if they had presented the ordinary invoice that should accompany merchandise of a greater value than $100. Had the package in question been treated in this way, the plaintiffs in error would not have been subjected to the additional charges for transmittal from the U. S. Bonded Warehouse, and storage and labor at the place of appraisement, which form the subject of this action.

II.

Reference to the procedure under the statutes and regulations and usages, as proved in the case at bar, show that where merchandise is accompanied by an invoice, and has not been admitted to entry within the prescribed time after the unloading of the vessel, that

such merchandise shall be sent by the customs officers to a U. S. Bonded Warehouse as unclaimed merchandise at the importer's expense (Section 2965 U. S. Revised Statutes). Subsequently, when said merchandise comes to be appraised, as all merchandise must be appraised before it shall finally be released from the official custody and scrutiny of the customs officers, such appraisement is conducted at the U. S. Public Store (Section 2901 U. S. Revised Statutes), commonly known as the U. S. Appraisers' Stores, at the Government's expense, there being no provision of law making the importer liable therefor. No charges are customary in such instances for transmittal to or for labor and storage at the so-called U. S. Apprisers' Stores.

The statutes need here to be partially restated so far as applicable. In substance, they establish U. S. Bonded Warehouses, to which customs inspectors, when unloading a ship, send all the ship's merchandise for which the owners have not made entries and presented delivery permits (Sections 2963 and 2965, U. S. Revised Statutes). When entry of merchandise is made by production of invoice the Collector may designate one or all the packages on the invoice to be sent to the Appraiser's Stores for appraisement (Section 2939, U. S. Revised Statutes). Unloaded merchandise, for which no entries or delivery permits have been presented, are conveyed to the U. S. Bonded Warehouse designated to receive them, and is spoken of in the law as "unclaimed" merchandise. The charges for storage, labor and cartage applicable to this class of merchandise, when sent to a U. S. Bonded Warehouse as "unclaimed," are paid by the importers, who may subsequently make entry for such merchandise. The appraisement of said merchandise, however, at the U. S. Appraiser's Stores, so-called, and the expenses incident thereto, are paid by the Government. The charges, also, for cartage, labor and storage of the packages of entered merchandise, which are sent directly from the ship to the Appraiser's Stores for ex-

amination and appraisement, are also paid, not by the owners, but by the Government.

U. S. Revised Statutes, 2789 and 2926 (taken from Sections 36 and 52 of the Organic Act of March 2, 1799, at which date, as the statutes show, there were no United States appraisers and no United States appraiser's stores, so-called), provide that all merchandise of which incomplete entry has been made for want of the original invoice, shall be sent to some warehouse or *store*house to await the entry thereof by production of invoice or by appraisement. It would not be lawful to send such merchandise to the United States Appraisers' Stores for *storage*, those buildings being leased by the Government for the examination and appraisement of merchandise only (Section 2955, U. S. Revised Statutes), which also provides that "*no leases shall be entered into* "*by the United States for any warehouses for the* "STORAGE *of* * * * *unclaimed merchandise* at any "port where there may exist any private bonded ware-"houses."

III.

The plaintiffs in error contend that having made the necessary verified application for entry in a case where concededly the goods are of value of less than $100, there is nothing incomplete or irregular, and there is no reason to subject them to any charges for transmittal, labor and storage beyond the charges which they, in this case, have paid that are ordinarily incident to the transfer from the ship to the United States bonded warehouse of unclaimed merchandise.

There is no authority of law for the exaction of the charges in controversy, unless it can be found in Sections 2789 and 2926, U. S. Revised Statutes, taken from Sections 36 and 52 of the Act of March 2, 1799; and

those sections do not give the authority. They simply provide that the merchandise shall be sent to some warehouse or *store*house, to await a completed entry by invoice or by appraisement, there having been no bonded warehouse or United States appraisers' stores, so-called, at the date of the Act of 1799; and, consequently, the appraisement was then made at the *store*-house by two merchants. By force of subsequent legislation, herein cited, authorizing United States bonded warehouses and United States appraisers' stores, goods are transferred from the former to the latter stores for the purposes of the Government in ascertaining the dutiable value thereof, if any.

A. P. KETCHUM,
Attorney for Plaintiffs.

158-212

Office Supreme Court, U. S.
FILED.
MAR 18 1895
JAMES H. McKENNEY,
CLERK.

158-212

CASE No. 14748.

In the Supreme Court of the United States.

OCTOBER TERM, 1894.

JOSEPH S. KENNEDY ET AL., PLAINTIFFS IN ERROR,
v.
DANIEL MAGONE, COLLECTOR OF THE PORT OF NEW YORK.
} No. 232.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR DEFENDANT IN ERROR.

In the Supreme Court of the United States.

OCTOBER TERM, 1894.

JOSEPH S. KENNEDY ET AL., PLAINTIFFS IN ERROR,
v.
DANIEL MAGONE, COLLECTOR OF THE PORT OF NEW YORK.
No. 232.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR DEFENDANT IN ERROR.

This was an action brought against the collector to recover moneys paid under protest. It was tried before Judge Lacombe and a jury. The court directed a verdict for the collector, and the importers assigned error.

STATEMENT OF FACTS.

This case relates entirely to the propriety of certain charges customarily made in the ports of this country in connection with the examination and appraisal of goods

landed as "unclaimed." The amount directly involved, outside of any penalty, is 70 cents. It is, however, a test case involving indirectly much larger amounts.

These goods were landed in April, 1888, without any invoice or regular entry. They were therefore classified as unclaimed, and sent to a warehouse in Jersey City. They were entered (but without invoice) in the following October. They were sent to the appraiser's stores in New York for examination, and appeared to consist of two packages of books of the value of $15. Upon each package charges were made of 15 cents cartage, 10 cents labor, and 10 cents storage. This represented the carting from Jersey City to New York, and storage in the appraiser's stores at the latter place. For the cartage to the Jersey City warehouse from the steamer and storage there the importer had already settled, and he does not complain of those items. The importer in his protest claimed also a penalty of $200 for these charges, basing his claim upon § 2636 of the Revised Statutes (p. 12).

ARGUMENT.

I.

The statutory custom-house practice may be described as follows:

Imported goods may be entered for consumption or for warehouse, or not entered at all. As a general rule they must be accompanied by an invoice. (Rev. St., § 2860.) If the invoice is lacking, the goods are retained in custody by the collector (§§ 2789, 2926). They are, however, admitted to entry if not over $100 in value, when the

collector is satisfied that neglect to produce such invoice was unintentional, and that the importation was made in good faith and without any purpose of defrauding or evading the revenue laws. (§ 2859.) If the goods are not regularly entered by their owner they are put into a public warehouse at his expense and risk (§ 2963), and before they are delivered to him he must pay all charges for storage, labor, and other expenses. (§ 2965.) There are a number of such warehouses in the district of New York, called customarily "General Order Stores." One of these is selected by the collector. Besides these public warehouses, there are special stores for the appraisers and their subordinates. These gentlemen are not required to peregrinate about among the warehouses for the purpose of examining unclaimed goods. (§ 2955.)

It is therefore necessary that unclaimed goods, when at last claimed by their owner, should be taken from the warehouse where they are stored, to the appraiser's stores, so that the packages may be opened and examined. It is to the reasonable expense of this operation that the present importers object.

II.

The custom at the port of New York was to make no charge at the appraiser's stores in case of goods regularly entered on a "straight invoice," but to exact such charges upon goods entered without an invoice or upon a defective invoice (p. 24). The importer in the latter case, however, saves the consular fees on the invoice; he also saves himself the trouble of paying the duties or bonding the goods upon arrival. (§ 2869.)

The custom of charging in case of unclaimed goods is based upon Treasury regulations dating, probably, from the time of the warehousing acts. (Regulations of 1857, art. 421; Customs Regulations of 1874, art. 538; General Regulations of 1884, art. 618.) Of course, if the goods when landed were sent to the appraiser's stores at once there would be but one storage charge, and the intermediate cartage and labor would also be saved. The importer, however, has no right, inherent or statutory, to demand that the goods which he fails to take care of himself should be put in any particular place. They may be put wherever the convenience of the Government demands. If they are sent to another warehouse for safekeeping, a subsequent examination and appraisement necessarily involves a duplication of cartage and storage charges.

III.

It is submitted that these charges, made under direction of the Secretary of the Treasury, are justified by §§ 2920, 2965, and 2989 of the Revised Statutes, and that they were reasonable and proper charges in all respects. Indeed, no attempt seems to have been made to declare them unreasonable. The proceedings of the collector are presumptively correct, and the presumption must be overthrown by proof. (*Erhardt* v. *Schroeder*, 155 U. S., 124.)

Judge Lacombe's opinion is set forth at pages 29 and 30 of the record, and reported at 41 Fed. Rep., 768. A similar decision was made by Judge Butler in Philadel-

phia. (*Hempstead* v. *Cadwalader*, 42 Fed. Rep., 529; see also Syn. Dec., 8993, and decision of General Appraisers, No. 2825, Nov. 16, 1894, per Somerville, G. A.)

It is therefore respectfully submitted that the judgment should be affirmed.

EDWARD B. WHITNEY,
Assistant Attorney-General.

158-212

MAR 26 1895
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1894.

No. 232.

JOSEPH S. KENNEDY and WILLIAM R. MOON,
Plaintiffs in Error,

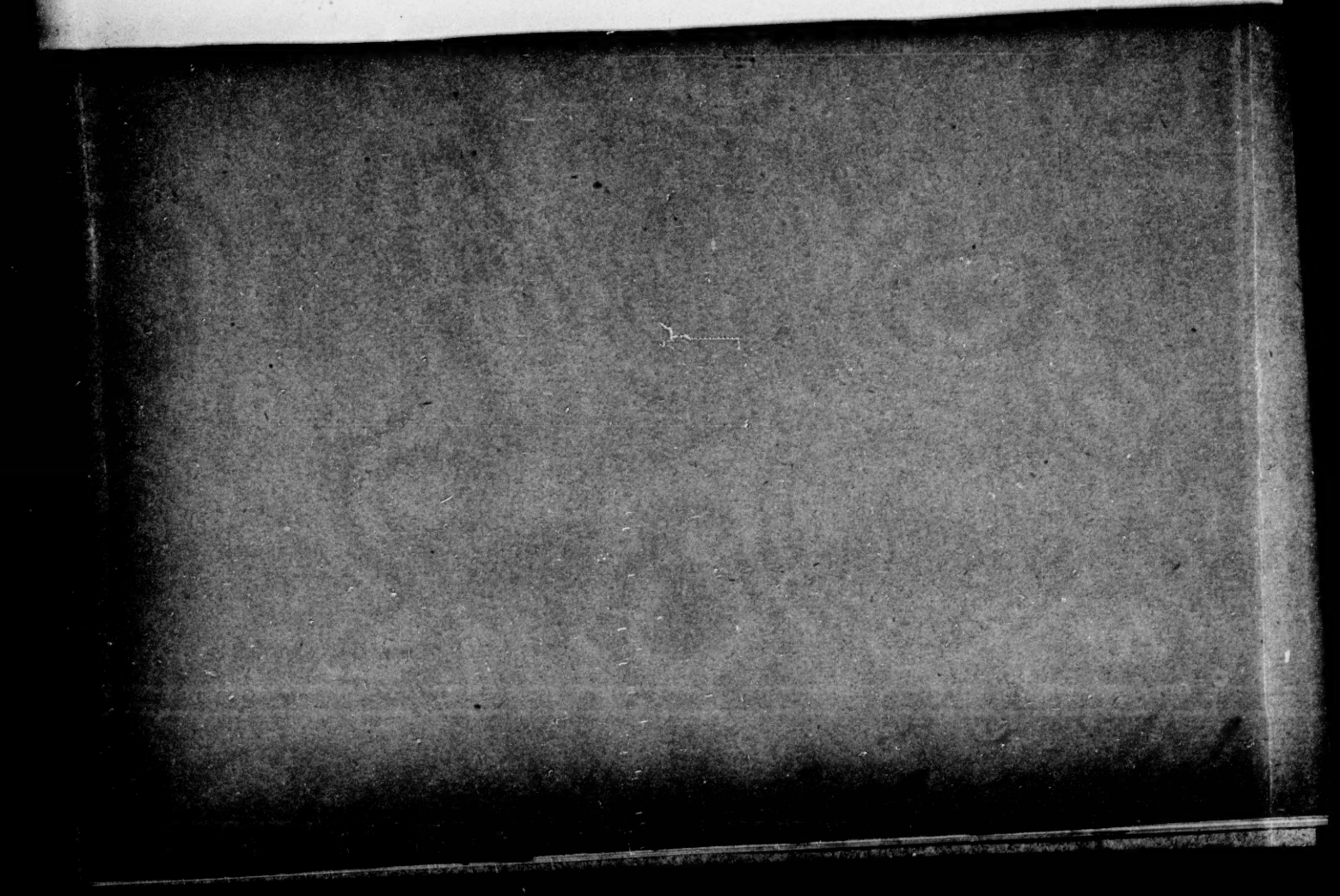
vs.

DANIEL MAGONE, Collector of the Port of New York.

PLAINTIFFS' BRIEF IN REPLY.

A. P. KETCHUM,
4 WILLIAM STREET,
Attorney for Plaintiffs.

C. G. Burgoyne, Walker and Centre Streets, N. Y.—1895.



Supreme Court of the United States.

JOSEPH S. KENNEDY and WILLIAM R. MOON, Plaintiffs in Error, AGAINST DANIEL MAGONE, Collector of the Port of New York.	No. 232, October Term, 1894.

Reply Brief for Plaintiffs in Error.

I.

The defendant in error at the conclusion of his statement of facts, remarks: "The importer in his protest claimed also a penalty of $200 for these charges, basing his claim upon paragraph § 2636 of the Revised Statutes."

In this connection the attention of the Court is respectfully called to the fact that the purpose for which the present action is brought is not the recovery of a penalty of $200, as might seem to be suggested by the brief of the defendant in error. It is true that the protest covered this claim, but it is also the fact that no action has ever been brought to enforce this penalty, and it is also a fact that the claim alluded to is now barred by the Statute of Limitations.

The illegal exaction which is the basis of the present suit is solely the charge for storage and labor *at* the

Appraisers' stores, and in connection with the cartage of the merchandise from the bonded warehouse to said Appraisers' stores, for which charges it is herein claimed there is no authority of law.

II.

The defendant in error in Point II. of his argument refers to the custom at the Port of New York of making no charge at the Appraiser's Stores in case of goods regularly entered on a "straight invoice," but "to exact such charges upon goods entered without an invoice or upon a defective invoice"; but *he fails to cite any statutory authority for this custom.*

Again he cites Treasury Regulations of 1857, 1874 and 1884. These regulations provide that "at ports where there are Government stores, preference shall be given to them for the storage of seized goods and of unclaimed goods, if there is sufficient space therein." A sufficient answer, however, to this suggestion is that Section 2955 Revised Statutes provides that the Government shall not lease warehouses for *storage* of unclaimed merchandise *at ports where there are private bonded warehouses.* Moreover, the plaintiffs in error do not dispute the correctness of the charges incidental to the storage of the goods as unclaimed *which charges were willingly paid,* but they insist that *additional* charges are not to be paid by them when the goods are sent to the "Appraiser's Stores," so called, for the purposes of the Government in ascertaining the *amount of duty* to which they are liable—in short, that the goods are not sent to the "Appraiser's Stores" for storage, but *for appraisement* as to value.

III.

The defendant in error in Point III. of his argument refers to Sections 2920, 2965 and 2989 of the Revised Statutes.

§ 2920 provides "that where an invoice does not contain the weight or quantity or measure of merchandise the same shall be weighed, gauged or measured at the expense of the importer." But the *irrelevancy of this section* to the question at issue in the present action will be immediately apparent upon reference to § 2882 of the Revised Statutes, which provides that merchandise shall be weighed, gauged or measured, as the case may be, *upon the wharf or place upon which the same may be landed* or put from the import vessel.

Furthermore, the goods in question were *neither weighed, gauged nor measured*, nor was it necessary that they should be.

§ 2965 of the Revised Statues simply provides for the storage *and not the appraisement* of imported merchandise, and when read in connection with § 2955 only authorizes such *storage* of unclaimed merchandise in Government warehouses at ports where there are *no private bonded warehouses.*" All this, however, has to do with the storage of the goods, *which storage the plaintiffs herein contend was not involved in the appraisement of the goods.*

§ 2989 simply provides that "the Secretary of the Treasury may establish rules and regulations not inconsistent with law" for the execution of the provisions relating to warehouses. Regulations by the Secretary of the Treasury, however, in excess of the power given to him by law are void and of no legal effect (Welsh vs. Merritt, 104 U. S., 694; Morrill vs. Jones, 106 U. S., 466; Campbell vs. United States, 107 U. S., 407; Balfour vs. Sullivan, 17 Fed. Rep., 231; Pascal vs. Sullivan, 21 Fed. Rep., 496, and United States vs McNelly, 28 Fed. Rep., 609).

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